UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

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March 15, 2005

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Re: Oregon Arena Corp., Case No. 04-31605
Objection to City of Portland's Statement of Cure

Dear Counsel:

The purpose of this letter is to give you my ruling on the Noteholders' Objection to City of Portland's Statement of Cure. For the reasons explained below, I conclude that the City is entitled to the cure it seeks, with the exception of attorney fees and costs related to the Memorial Coliseum Operating Agreement single contract issue. An amount sufficient to cover those fees and costs must be paid into a trust account to be paid to the City if it prevails on appeal.

Pursuant to debtor's confirmed plan of reorganization, the City submitted its Statement of Cure, setting out the amounts it asserts debtor must pay in order to assume and assign the executory contract between the City and debtor. The City lists three categories of costs and expenses that must be paid: (1) user fees and rent totaling $78,188.07; (2) attorney fees and costs totaling $251,946.70; and (3) Ellerbe Becket expert fees and costs totaling $87,611.08.

The noteholders[1] filed an objection to the second and third

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[1] Portland Arena Management LLC (PAM) has succeeded to the interest of the noteholders. Because it is now the interested party, I will hereafter refer to PAM as the objecting

(continued...)

categories only. It does not object to paying the user fees and rent, and the parties represent that that payment has been made. Thus, the only issues to be resolved are the City's right to payment of the amounts set out in categories (2) and (3), the attorney and expert fees and costs.

In order to assume and assign an executory contract that is in default, a debtor in possession must, at the time of assumption, cure the default and compensate the other party "for any actual pecuniary loss to such party resulting from such default[.]" § 365(b)(1)(A), (B).[2] The City seeks attorney fees and costs under attorney fee provisions of the various agreements it has with debtor, and seeks expert fees and costs under § 18.16 of the Arena Ground Lease.

1. Whether the City is entitled to payment of attorney and expert fees and costs incurred in litigation over assumption of executory contracts pursuant to § 365

PAM argues first that the City is not entitled to any fees incurred in the litigation, because the litigation did not arise under the contracts but instead arose under the Bankruptcy Code. According to PAM, the attorney fee provisions of the contracts do not apply and the Bankruptcy Code does not provide any basis for recovery of the fees.

There is no independent right to attorney fees under § 365(b)(1); any right to attorney fees must arise out of the executory contract or lease that is being assumed. In re Westside Print Works, Inc., 180 B.R. 557, 564 (9th Cir. BAP 1995).

> The purpose of § 365(b)(1)(B) is to indemnify the other party to the contract or lease being assumed, against loss. The purpose of an attorney's fee clause in a lease as well as an attorney's fee clause in a security agreement is the same, to indemnify the lessor or secured party against legal expenses incurred by reason of the other party's default.

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[1](...continued)
party.

[2] Unless otherwise indicated, all section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

In re Bullock, 17 B.R. 438, 439 (9th Cir. BAP 1982).

PAM argues that, regardless of any contract provision allowing for recovery of fees and expenses that would be enforceable under state law, the law precludes recovery where the issues being litigated are issues of federal bankruptcy law rather than of state contract law. Because it views the disputes in this case for which the City seeks recovery of fees and expenses as related primarily to adequate assurance of future performance of the agreements, which is an issue of federal law, see In re Steinebach, 303 B.R. 634, 644 (Bankr. D. Ariz. 2004), it contends that the City is not entitled to recover any of the fees or expenses incurred.

In In re Coast Trading Co., Inc., 744 F.2d 686 (9th Cir. 1984), the Ninth Circuit explained that, although there is no general right to attorney fees in actions in bankruptcy, attorney fees may be awarded in accordance with state law. Id. at 693. It concluded that the prevailing party in that case was not entitled to attorney fees because, "[a]bsent bad faith or harassment, attorneys' fees are not available for the litigation of federal bankruptcy issues under a contract which provides for attorneys' fees for enforcement of the contract." Id. Accord In re Fobian, 951 F.2d 1149 (9th Cir. 1991)(no fees for litigating federal bankruptcy issues where contract provided for fees for enforcement of contract; plan confirmation is not enforcement of a contract).

Although the issues that were litigated in this case arose in the context of § 365 assumption or rejection of the lease, the issues themselves were primarily issues of state contract law: whether there was a default under the lease and, if so, what was required to cure the default. The fact that there is no independent federal right to attorney fees incurred in litigating issues arising under § 365 does not preclude an award of attorney fees for litigating state contract issues, if those fees may be awarded under state law.

2. Whether fees are allowable under state law

Under Oregon law, a party is entitled to recover attorney fees "only if a statute or contract authorizes such an award." Swett v. Bradbury, 335 Or. 378, 381 (2003). The City relies on the attorney fee provisions of the agreements between the parties, primarily the provision contained in the Arena Ground

Lease. That agreement provides:

> In the event a suit, action, Dispute Resolution, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Lease or with respect to any dispute relating to this Lease, the prevailing or non-defaulting party shall be entitled to recover from the losing or defaulting party its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith.

Arena Ground Lease § 18.16 (emphasis supplied). See also Memorial Coliseum Operating Agreement § 18.15; Entertainment Complex Ground Lease § 16.16; Declaration of Covenants, Conditions and Restrictions for the Oregon Arena Project § 28.14; Public Parking Facilities Management Agreement § 17.14. The provision in the Development Agreement is more limited, providing for fees and costs in "a legal action to construe or enforce a provision of this Agreement[.]" Development Agreement § 36.8. Because the great bulk of the fees in this case were incurred in litigating issues relating to the lease, I will focus on the language of the Arena Ground Lease.[3]

PAM ignores the pertinent language of this fee provision, focusing only on the portion of the provision that refers to enforcement of the agreement.[4] However, the provision is much broader than that. Unlike the attorney fee provisions considered in the cases on which PAM relies, this agreement specifically provides for an award of attorney fees to the prevailing party in any "proceeding of any nature whatsoever, including without

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[3] To the extent fees were incurred in litigating matters relating to the Memorial Coliseum Operating Agreement, the attorney fee provision in that agreement is similar to the one in the lease. None of the issues related to the Development Agreement, which contains the more limited fee provision.

[4] In PAM's brief, counsel omitted from the quotation of the attorney fee provision the language that directly controls in this case. I cannot think of any principled reason for the omission.

limitation any proceeding under the U.S. Bankruptcy Code," "with respect to any dispute relating to this Lease[.]" Arena Ground Lease ¶ 18.16 (emphasis supplied).

There is no question that the assumption and assignment issues were raised in proceedings under the Bankruptcy Code. Further, they involved a dispute relating to the lease. Therefore, unlike many fee provisions, this one specifically provides for attorney and expert fees for litigation under the Bankruptcy Code, provided that the litigation related to a dispute involving the lease.

Because PAM ignores the pertinent language of the lease, it fails even to attempt to explain why recovery of fees should not be allowed pursuant to state law under this provision in the lease that provides for fees for litigation involving the Bankruptcy Code. There are no state court decisions of which I am aware that would preclude enforcement of such a broad attorney fee provision. PAM does not argue that there is some reason why, as a matter of state contract law, parties cannot contract for the payment of fees for litigation under the Bankruptcy Code or why a court should not apply such a provision.

I conclude that the language of the lease fee provision is broad enough to cover attorney and expert fees incurred in litigating issues of assumption and assignment, including issues of adequate assurance of future performance. Because the lease by its terms provides for recovery of fees and costs incurred in bankruptcy litigation relating to the lease, the City may recover those fees and costs as part of the default cure for assumption of the agreement.[5]

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[5] PAM argues that In re Dailey, 289 B.R. 157 (Bankr. D. Mont. 2003), is factually similar to this case, and in that case the court denied attorney fees. Dailey is not factually similar; in that case, the fees that were requested had been incurred after cure of default, not as part of the cure. Id. at 160. I also reject PAM's view that In re I-Mind Educ. Sys., Inc., 269 B.R. 47 (Bankr. N.D. Cal. 2001), cited by the City, "flatly contradicts the purpose for which the City cited it." Reply to City of Portland's Response to Noteholders' Motion to Determine Cure Amount at 8. Although the court denied attorney fees in that case, the reason was that the lease "was not drafted broadly

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3. Notice of default

PAM argues that the City is not entitled to recover fees and costs, because it did not declare a default under the agreement and did not follow the default procedures, including submitting the matters to arbitration. However, the failure to give notice of default does not mean that no default existed in debtor's performance of the ground lease. PAM does not explain how a failure to give notice of default could result in waiver of the right under the Bankruptcy Code to cure of defaults in order to assume and assign the agreement. Further, there is no evidence that the City had knowledge of the defaults before bankruptcy. Finally, I already found that there were defaults when I ruled at the end of the confirmation hearing that the arena was not currently a first-class facility under prevailing standards for facilities of equivalent age.[6]

As to failure to arbitrate any disputes that arose under the ground lease, the parties agreed during the confirmation process that I had jurisdiction to decide what was adequate assurance of future performance in order to determine whether the agreement could be assumed and assigned. In order to determine whether the contract could be assumed, I had to decide whether there were defaults that must be cured. Thus, as the parties recognized during the confirmation litigation, arbitration was not required in order to determine assumption and assignment issues.

4. Prevailing party

PAM also argues that the City is not entitled to recover fees and costs, because it was not the prevailing party on all

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[5](...continued)
enough to allow recovery" of fees for litigating relief from stay or the motion to assume the lease. 269 B.R. at 48. The lease provided for fees if an action or arbitration was brought due to breach of the lease. As the court noted, neither relief from stay nor the motion to assume the lease was a suit or arbitration on the contract. In this case, in contrast, the lease agreement is drafted much more broadly, specifically providing for fees for any proceeding under the Bankruptcy Code.

[6] PAM's argument that that finding is not a finding of default is baffling.

issues.

Under Oregon law, where a contract provides that attorney fees may be recovered by a prevailing party, and the agreement does not define "prevailing party," "prevailing party" means "the party in whose favor final judgment or decree is rendered." Anderson v. Jensen Racing, Inc., 324 Or. 570, 579 (1997).[7] Where relief other than monetary relief is sought, the court weighs "what was sought by each party against the result obtained * * *." Lawrence v. Peel, 45 Or. App. 233, 243 (1980), quoted with approval in Meduri Farms, Inc. v. Robert Jahn Corp., 120 Or. App. 40, 44 (1993). Thus, I must consider the positions taken by the parties from the beginning of the dispute and throughout the proceedings, and the ultimate result obtained. Although PAM is correct that there need not always be a prevailing party, see, e.g., Lawrence v. Peel, 45 Or. App. at 243, I do not agree with PAM that this is a case in which neither party prevailed.

PAM argues that the City was not the prevailing party "on all issues." Objection to City of Portland's Statement of Cure and Motion to Determine Cure Amount at 3. In particular, it argues that, with regard to the first-class standard, the court did not accept the City's expert's testimony regarding the amount that needed to be spent on repairs and improvements to bring the arena up to standard or the time period necessary to accomplish the upgrades. It asserts that the ruling was "closer to the amounts and time frame offered by the Noteholders prior to the commencement of the confirmation hearing and conceded by the Noteholders at the confirmation hearing to be required." Id. at 3-4.

I disagree with PAM's view of the history of this litigation. From the outset, the City was concerned primarily with (1) obtaining payment of user fees held by debtor at the beginning of the case; (2) challenging debtor's ability to reject

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[7] This definition came from former ORS 20.096(5). In 2001, the definition of "prevailing party" was amended and moved to ORS 20.077(2). The statute now provides a procedure for determining who is the prevailing party when a case involves more than one claim. However, the definition of "prevailing party" is essentially unchanged ("the party who receives a favorable judgment or arbitration on the claim") for cases such as this one involving only one claim.

the Memorial Coliseum Operating Agreement while assuming other portions of the agreement with the City; and (3) enforcing debtor's obligation under the ground lease to maintain the arena as a first-class facility.[8]

There is no dispute that the City prevailed on the first issue.

As to the second issue, I ruled that the Memorial Coliseum Operating Agreement is part of one indivisible agreement that could not be separately rejected. That ruling is currently on appeal. The confirmed plan in this case provides that, if that order is affirmed on appeal, "the Debtor will be deemed to have assumed and assigned the Coliseum Operating Agreement to AcquisitionCo. effective as of the Effective Date. If the City Order is not affirmed . . . [the agreement] will be deemed rejected as of the Entry Date[.]" Fourth Amended Plan of Reorganization at ¶ 7.1(g). I agree with PAM that I cannot determine who the prevailing party is on the single contract issue until the appeal is decided. Therefore, the City should provide to PAM a statement of fees that related to the single contract issue. PAM shall file any objections to the statement within 10 days of service of the City's statement. I will then determine the amount of fees that relate to the single contract issue. Debtor[9] shall pay an amount sufficient to cover those fees into a trust account, to be held until the appeal is concluded. If my single contract order is affirmed on appeal, the funds shall be paid over to the City. If my order is reversed on appeal and the Memorial Coliseum Operating Agreement determined to be a separable agreement and therefore rejected, the funds shall be returned to debtor.

PAM also asserts that the City did not prevail on the first-class facility issue. The first-class standard is contained in

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[8] As I explained above, although that issue arose in the context of the Bankruptcy Code provision dealing with assumption of executory contracts, the ground lease in this case contains an attorney and expert fee provision broad enough to provide for fees incurred in litigating the Code issues.

[9] I recognize that, as of the effective date of the plan, debtor no longer exists. My references to "debtor" mean the successor in interest to debtor.

the Arena Ground Lease. That lease provides for payment of attorney and expert fees to "the prevailing or non-defaulting party" by "the losing or defaulting party[.]" Thus, the agreement does not require that the City be the prevailing party, so long as debtor is the defaulting party and the City is the non-defaulting party. It is clear that debtor defaulted on the agreement in failing to maintain the arena in first-class condition under the standard applicable under the ground lease, and that the City was not in default. Therefore, regardless of whether the City can be considered the prevailing party, it is entitled to its fees and expenses.

Nonetheless, I also conclude that the City was the prevailing party. I have reviewed the parties' positions over the course of this case. The noteholders consistently resisted the idea that substantial upgrades or repairs were required in order to cure defaults under the ground lease. The issue remained a live one up to and through the confirmation hearing.

The issue of first-class standards was originally raised by TBI in its argument that its use agreement with debtor required the arena to be in first-class condition. The noteholders' position was that the list of repairs and improvements TBI asserted needed to be made was a "wish list" that did not need to be addressed for purposes of assumption and assignment of the agreement. The noteholders argued that I did not need to decide any issues relating to the first-class standard, asserting instead that any issues about first-class standards must be arbitrated.

In early July 2004, the City indicated that it was going to enforce the Arena Ground Lease and the requirement that the arena be maintained as a first-class facility. The noteholders' response continued to be that the court need not determine the first-class issue before confirmation.

On August 19, 2004, I ruled that I did need to decide the standard to which the arena must be held in order to decide whether to confirm the plan. I rejected the noteholders' position that the first-class standard was frozen in time at the outset of the lease term, and held instead that it was an evolving standard as gauged by other similar properties of equivalent age.

The City filed its confirmation brief on August 31, 2004,

arguing that it would cost between $39.6 and 47.6 million to bring the arena up to first-class standard. The noteholders' brief, filed the same date, argued that debtor was not in default under the agreement with the City, and that the court should disregard the City's and TBI's experts with regard to the condition of the arena. The noteholders argued that the court need not decide what specific upgrades and improvements needed to be made, and that they would implement the Global Spectrum report, which simply went through the $11 million in items Mr. Patterson had outlined in TBI's original motion and accepted or rejected the items.

During the course of the confirmation hearing, the noteholders' expert agreed with the City's expert to the extent that between $15 and $20 million needed to be spent to bring the arena up to first-class standards. From this change in position, PAM essentially argues that there was no real dispute between the noteholders and the City about what was needed to bring the arena into compliance with the requirements of the lease, and so the City did not prevail. It complains that the noteholders did not have access to the same level of cooperation from TBI and debtor, so they were not able to engage in the same in-depth analysis that the City's expert was able to engage in.

However, the lack of information available to the noteholders is not relevant to whether the City prevailed in its dispute with debtor. See In re Crown Books Corp., 269 B.R. 12, 16-17 (Bankr. D. Del. 2001). In order to obtain cure of the defaults under the lease, the City was required to litigate whether there was a default and what was required to cure the default. The noteholders did not merely disagree about what was meant by a first-class facility or whether the arena was a first-class facility; they also argued that the court need not decide those issues, or that there was no default because of a lack of notice of default, or that the issues needed to be arbitrated.

Although the noteholders' position evolved so that, during the confirmation hearing, their expert agreed with many of the items contained in the City's expert's report, the noteholders had from the very beginning resisted litigating the matter or admitting that there was a default. The noteholders went into the confirmation hearing with an expert who admitted that approximately $10 million was required over the next two to five years to bring the arena up to standard. My final determination about what was required to meet the first-class standard (the

cost of which was approximately $22 to $26 million) was more in line with the City's expert's opinion than with the noteholders' expert opinion. Therefore, I conclude that the City was the prevailing party and, under the lease, is entitled to be paid its attorney and expert fees and costs.

CONCLUSION

PAM does not challenge the reasonableness of the City's fees or costs. Therefore, in order to cure the default under the agreement with the City, the City's attorney and expert fees and costs must be paid in the amount set out in the City's statement of cure, with the exception of the fees and costs related to the single contract issue. Those fees must be separately paid into a trust account pending a final determination on appeal.

Mr. Summers should prepare the order.

Very truly yours,

/s/Elizabeth L. Perris

ELIZABETH L. PERRIS
Bankruptcy Judge